No. 97

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

CAFETERIA AND RESTAURANT WORKERS UNION, LOCAL 473, AFL-CIO, AND RACHEL M. BRAWNER, *Petitioners*

v.

NEIL H. MCELROY, Individually; THOMAS S. GATES, Individually and as Secretary of Defense; D. M. TYREE, Individually and as Superintendent of the United States Naval Gun Factory; and H. C. WILLIAMS, Individually and as Security Officer of United States Naval Gun Factory, *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

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I. THE STATUS OF NEIL H. McELROY AS A PARTY TO THIS PROCEEDING

It is contended that Neil H. McElroy has ceased to be a party to the action in his individual capacity (Res. br. p. 6, n. 6). We had thought that respondents would put this matter in issue by moving the Court to dismiss as to Neil H. McElroy, but no motion has been filed.

On May 24, 1960, the petition for a writ of certiorari was filed in this case. Subsequent thereto, during the pendency of the petition, the Court of Appeals dismissed the appeal as it relates to Neil H. McElroy individually. The first question presented, therefore, is the power of the Court of Appeals to dismiss an appeal as to a party who has already been named as a respondent in a petition for a writ of certiorari pending before this Court. Consideration of the question requires a fuller preliminary statement of the manner in which it arises.

A. The Facts

The action in this case was commenced *inter alia* against Neil H. McElroy, individually and as Secretary of Defense, and Thomas S. Gates, individually and as Secretary of the Navy (R. 2). On December 1, 1959, Neil H. McElroy resigned as Secretary of Defense, and on December 2, 1959, Thomas S. Gates was appointed Secretary of Defense. Thereafter, on February 3, 1960, petitioners moved the Court of Appeals to supplement the record to show that (1) the "action against Defendant Thomas S. Gates continues . . . individually and as Secretary of Defense," and (2) the "action . . . continues against Neil H. McElroy individually in order to recover against him damages for the harm inflicted by his performance of an unauthorized act" (R. 140). In answer, respondents did not object as to Thomas S. Gates, but as to Neil H. McElroy they "respectfully submitted that the action as to him should abate, and not be continued against him in his individual capacity . . ." (R. 141).

Thereafter, on April 14, 1960, the Court of Appeals rendered its *en banc* decision affirming the District

Court's judgment dismissing the complaint (R. 144). Then, on April 25, 1960, the Court of Appeals ordered that "the motion to supplement the record is denied, without prejudice to filing by appellants of a motion to substitute party appellees as provided for by Rule 25(d) of the Federal Rules of Civil Procedure and without prejudice to filing by appellees of a motion to dismiss this appeal as to appellee Neil H. McElroy in his individual capacity" (R. 143). On April 27, 1960, petitioners moved the Court of Appeals "to substitute Appellee Thomas S. Gates as the party appellee in the office of Secretary of Defense" (R. 184). On May 18, 1960, the Court of Appeals ordered that "Thomas S. Gates, Secretary of Defense, is substituted as an appellee in his office of Secretary of Defense in the place and stead of Neil H. McElroy as Secretary of Defense" (R. 186). Then, on May 24, 1960, the petition for a writ of certiorari was filed, in which petitioners *inter alia* named as respondents "Neil H. McElroy, Individually; Thomas S. Gates, Individually and as Secretary of Defense."

Subsequent to the filing of the petition for the writ, during its pendency but before its grant, the Court of Appeals on June 2, 1960 entered an order reciting that "Upon consideration of appellees' motion to dismiss this appeal as to Neil H. McElroy individually, it is Ordered by the court that insofar as this appeal relates to Neil H. McElroy as an individual the appeal is dismissed" (R. 189). Receipt of this order was petitioners' first notice that any motion to dismiss as to Neil H. McElroy had been filed and was pending. As petitioners later informed the Court of Appeals, "At the time of filing the petition for a writ of certiorari, counsel for appellants did not know that there

were any pending motions before this Court. . . . Receipt of this order [of dismissal] on June 3, 1960 was the first knowledge that counsel for appellants had of the pendency of a motion to dismiss the appeal as to Neil H. McElroy. Counsel for appellants had not before then received any such motion" (R. 193).

Respondents frankly admitted lack of service of the motion. As they informed the Court of Appeals, "proper service was not made due to our apparent mistake" (R. 191). As they elaborated (R. 190-191):

> The appellees, on May 3, 1960, moved to dismiss the appeal as to Neil H. McElroy as an individual which motion was granted by the court by order dated June 2, 1960. On June 3, 1960, Mr. Bernard Dunau, counsel for appellants, telephonically advised that he had just received a copy of the court's order of June 2, 1960, but that he had not received a copy of the appellees' motion, and that had he received the motion he would have filed an opposition thereto. We immediately made a check in an effort to verify the question of service. It appears, as best we can ascertain, that a letter of transmittal of the motion to Mr. Dunau was prepared. However, our Division mailroom which should have a record of the letter if it was sent in the normal course, contains no such record of the transmittal letter to Mr. Dunau having been sent. In view of that and the fact that Mr. Dunau did not receive a copy of the motion, we regret that we must conclude that a letter transmitting the motion was not, in fact, sent due to some administrative inadvertency. A copy of our motion of May 3, 1960 is being forwarded to Mr. Dunau today along with a copy of this motion.

Thus, the motion "to dismiss this appeal as to appellee Neil H. McElroy in his individual capacity," while

filed on May 3, 1960, was not served until June 7, 1960 (R. 190-191), well after the petition for the writ of certiorari had been filed.

Upon discovery of these facts, respondents on June 7, 1960 moved the Court of Appeals to reconsider and reaffirm the order of June 2, 1960 dismissing the appeal as to Neil H. McElroy in his individual capacity (R. 190-191). Petitioners cross-moved the Court of Appeals "to vacate the order of June 2, 1960, and to deny appellees' motion to dismiss of May 3, 1960, without prejudice to the filing of a motion to dismiss in the Supreme Court of the United States or in any further proceedings which may eventuate from the proceedings in the Supreme Court of the United States" (R. 192). In explanation, petitioners stated in part that (R. 193-194):

> In the absence of service of the motion to dismiss the appeal as to Neil H. McElroy, it would appear that the order of June 2, 1960, granting that motion should be vacated for lack of notice of and opportunity to be heard on the motion. Furthermore, the order was entered on June 2, 1960, subsequent to the filing of the petition for a writ of certiorari on May 24, 1960. Consequently, the order was entered after the case was already before the Supreme Court.
>
> The "Motion to Reconsider and Reaffirm the Court's Order of June 2, 1960 Granting Appellees' Motion to Dismiss as to Neil H. McElroy in His Individual Capacity," served on June 6, 1960, is in substance a renewal of the original motion to dismiss. Since the case is presently pending before the Supreme Court, this Court would appear to have no jurisdiction to entertain a motion to dismiss an appeal which is no longer before it. In any event, even if jurisdiction exists, comity sug-

> gests that this Court should stay its hand and decline to dismiss an appeal as to a party who has already been named as a respondent in a petition for a writ of certiorari pending before the Supreme Court. In short, the case is now before the Supreme Court, and any further action to secure dismissal as to Neil H. McElroy should be taken in the proceedings before that court.

On June 30, 1960, the Court of Appeals ordered that "appellees' motion to reconsider is granted and the order of this court entered herein on June 2, 1960, dismissing this appeal insofar as it relates to Neil H. McElroy as an individual is reaffirmed" (R. 198).

B. Lack of Power in the Court of Appeals to Dismiss an Appeal as to a Party After a Petition for a Writ of Certiorari Has Been Filed

The Court of Appeals had no power to dismiss the appeal as to Neil H. McElroy in his individual capacity after the petition for a writ of certiorari had been filed. Analysis may begin with Rule 73(a) of the Federal Rules of Civil Procedure, governing appeals from a District Court to a Court of Appeals. It states in part that:

> A party may appeal from a judgment by filing with the district court a notice of appeal. . . . If an appeal has not been docketed, the parties, with the approval of the district court, may dismiss the appeal by stipulation, filed in that court, or that court may dismiss the appeal upon motion and notice by the appellant.

This means that, before the appeal is docketed, the District Court is empowered to dismiss the appeal by agreement or at the instance of the appellant. It is divested even of this power once the appeal has been

docketed. And it never has power to dismiss an appeal at the instance of the appellee. See *United States* v. *Frank B. Killian Co.*, 269 F. 2d 491, 494 (C.A. 6); 7 Moore's Federal Practice ¶73.12 (2d ed.). The pertinent principle has been stated by this Court (*Newton* v. *Consolidated Gas Co.*, 258 U.S. 165, 177):

> "One general rule in all cases (subject, however, to some qualifications) is that an appeal suspends the power of the court below to proceed further in the cause." Undoubtedly, after appeal, the trial court may, if the purpose of justice require, preserve the status quo until decision by the appellate court. . . . But it may not finally adjudicate substantial rights directly involved in the appeal.[1]

The identical principle obtains upon direct appeal to this Court from a judgment of a District Court. 28 U.S.C. §§ 1252, 1253. "When an appeal is permitted by law from a district court to the Supreme Court of the United States, an appeal shall be taken, perfected, and prosecuted pursuant to law and the Rules of the Supreme Court of the United States governing such an appeal." Rule 72, Fed. R. Civ. Proc. This Court's Rule 14(1) provides that:

> After a notice of appeal has been filed, but before the case has been docketed in this court, the parties may at any time dismiss the appeal by stipulation in the court possessed of the record, or that court may dismiss the appeal upon motion and notice by the appellant. For dismissal after the case has been docketed, see Rule 60 [not here relevant].

[1] And see *In re Allen*, 115 F. 2d 936, 939 (C. C. P. A.): "The general rule is that where an appeal has been taken the effect of which is to transfer jurisdiction of the cause to the appellate court, the court from which the appeal is taken can proceed no further with respect to the subject matter of the appeal until the appeal has been disposed of."

Rule 14(1) of this Court's rules and Rule 73(a) of the Federal Rules of Civil Procedure are thus identical. Both divest the lower court of any power to dismiss an appeal once it has been docketed. And the lower court never has power to dismiss an appeal over the objection of the appellant. The controlling principle, modified only as to an agreed dismissal or one at the instance of the appellant before the appeal is docketed, is that "the filing of a notice of appeal deprives the district court of power to proceed any further in the matter. . . ." 7 Moore's Federal Practice ¶ 73.12 (2d ed.).[2]

No different principle is deducible when the route to appellate review is from the Court of Appeals to this Court by way of a petition for a writ of certiorari. Indeed, since the filing of the petition and the transcript of record coalesce (Rule 21(1)), there is not even a hiatus preceding docketing during which petitioner by stipulation or on his own motion can have his own petition dismissed in the Court of Appeals (Rule 60). And orderly procedure commands that once the petition for the writ has been filed the power of the Court of Appeals to affect the merits ceases. It would be intolerable were the character of the cause subject to the power of the lower court to alter it in the interim between the filing of the petition and its

[2] Other situations illustrate the principle. On enforcement or review of an order of an administrative agency the court acquires exclusive jurisdiction upon the filing of the record with it. P.L. 85-791, 72 Stat. 941, enacted Aug. 28, 1958, §§ 3(d), 4(d), 10, 14, 15, 16(b), 19(b), 25, 26, 30(b); S. Rep. No. 2129, 85th Cong., 2d Sess., 2-3; H. Rep. No. 42, 85th Cong., 1st Sess., 9-10. On removal, written notice to adverse parties and the filing of a copy of the removal petition with the clerk of the State court "shall effect the removal and the State court shall proceed no further unless and until the case is remanded." 28 U. S. C. 1446(e).

disposition. As in this case, where four and one-half months elapsed between the filing of the petition and its grant, many months may transpire before this Court rules upon the petition. This may be due to the intervention of the summer recess, or because the Court chooses to hold the petition pending the determination of a cognate case, or because the Court wishes to search the case closely before acting on the petition. Whatever the reason, and whether the period is short or long, the judgment sought to be reviewed and the status of the case must remain free of alteration by the lower court during the pendency of the petition in this Court.

In this case, the Court of Appeals, during the pendency of the petition, dismissed the appeal as to a party who had been named as a respondent in the petition. No more fundamental alteration of the character of the proceeding could be made than to dismiss a party from it. The petition having operated to transfer jurisdiction to this Court, the Court of Appeals was without power to dismiss a party from the proceeding.[3]

[3] In the court below respondents argued, as they do in this Court (Res. br. p. 6, n. 6), that "Only after a writ of certiorari is granted would . . . [the] Court [of Appeals] lose jurisdiction of the case" (R. 196). Neither of the two cases cited in support have any relevance. *Magnum Import Co.* v. *Coty*, 262 U.S. 159, 163-164, holds that a Court of Appeals need not "withhold its mandate or . . . suspend the operation of its judgment or decree pending application for certiorari to us." But it is a far cry from declining to stay a judgment to altering its character during the pendency of a petition. *Waskey* v. *Hammer*, 179 F. 273 (C. A. 9), states that the issuance of a writ of certiorari operates as a supersedeas. But see *Magnum Import Co.* v. *Coty*, 262 U.S. 159, 164.

C. No Availability of or Need to File a Petition for a Writ of Certiorari to Review the Dismissal Orders Entered After the First Petition for the Writ Had Been Filed

Respondents contend that, "Since petitioners have not filed a petition for a writ of certiorari from the June 30 order, the dismissal of Mr. McElroy is now final" (Res. br. p. 6, n. 6). The next question therefore is whether it was necessary, in order to preserve the issue, to have filed a petition for a writ of certiorari seeking review of the orders of June 2, 1960 and June 30, 1960 dismissing the appeal as to Neil H. McElroy.

A petition need not and could not have been filed. "Cases *in* the courts of appeals may be reviewed by the Supreme Court by . . . writ of certiorari . . . ." 28 U.S.C. 1254(1), emphasis supplied. The "condition attached to the grant is that there shall be a case 'in' the court of appeals."[4] There was no case "in" the Court of Appeals when it entered its dismissal orders. The case had been transferred from the Court of Appeals to this Court by the earlier filing of the petition for a writ of certiorari. No case being "in" the Court of Appeals, no new petition could have been filed.

Nor was there need to file an ordinary petition or to seek leave to file a petition for an extraordinary writ. This Court without more possesses full power to protect the plenary jurisdiction it had acquired over the whole of the case. The case in its entirety had already been transferred to this Court. When brought to this Court Neil H. McElroy was a party to the case. No action in or by this Court dismissed him from the case.

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[4] Robertson & Kirkham, *Jurisdiction of the Supreme Court of the United States*, § 128 (Wolf. and Kur. ed. 1951).

To effect his dismissal requires a motion to that end filed in this Court or *sua sponte* action by this Court. If a motion to dismiss were filed in this Court in reliance upon the dismissal of the appeal by the court below, or if this Court were to consider *sua sponte* the effect of the dismissal below, the orders below would be found to be nullities because entered without jurisdiction. Cognizance of them would therefore be withheld. Hence the continuance of Neil H. McElroy as a party to the proceeding in this Court, and in any further proceedings which may eventuate, would not and could not be affected by the *ultra vires* orders below.

In short, Neil H. McElroy was a party to the proceeding when this Court acquired jurisdiction of the cause. No subsequent order of any other court could displace this Court's power over him. And no independent review of the subsequent order need be sought to repel its entrenchment upon this Court's previously acquired jurisdiction over the case and the parties to it.

D. Respondents' Answerability in Damages for the Injury Caused by the Wrong Committed

Of course the purpose of continuing Neil H. McElroy as a party to the proceeding is to maintain his answerability in damages for the injury caused by the wrong committed. This presents the fundamental question whether he and the other respondents are responsible for monetary indemnification of the victim of their tort.

The gravamen of the wrong is injury caused by action taken in excess of authority or under an authority not validly conferred. If his action is unau-

thorized or unconstitutional,[5] the governmental officer stands "stripped of his official or representative character and is subject in his person to the consequences of his individual conduct." *Ex parte Young*, 209 U.S. 123, 160. And one of the consequences to which a functionary who acts in excess of his authority "is subject in his person" is liability for payment of damages for the injury he inflicts.

Analysis begins with *Barr v. Matteo*, 360 U.S. 564. The absolute immunity from civil suit for damages regardless of the actor's motives extended by that decision to executive officers is premised upon action taken *within the scope of authority*. Stress upon the sweep of the immunity tends to overlook this crucial condition to its grant. Yet the decision is unmistakably predicated upon this limitation. The plurality opinion held that the occasion was privileged because the officer's act was in the "exercise of discretionary authority." 360 U.S. at 575. The same qualification is expressed in the opinion's quotation from *Spalding* v. *Vilas*, 161 U.S. 483, 498-499, in which the officer's immunity is confined to acts "keeping within the limits of his authority," a restriction reiterated by the later reference to his privilege "if he acts, *having authority*. . . ." 360 U.S. at 570 (emphasis supplied). The quotation from *Gregoire* v. *Biddle*, 177 F. 2d 579, 581 (C.A. 2), similarly cabins the privilege by its statement that "The decisions have, indeed, always imposed as a limitation upon the immunity that the

[5] Unconstitutional conduct is of course unauthorized conduct. "The only difference is that . . . [in the case of unconstitutional conduct] the power has been conferred in form but the grant is lacking in substance because of its constitutional invalidity." *Larson* v. *Domestic and Foreign Commerce Corp.*, 327 U.S. 682, 690.

official's act must have been within the scope of his powers. . . ." 360 U.S. at 572. The concurring opinion observed that the officer's act "was neither unauthorized nor plainly beyond the scope of . . . [his] official business. . . . " 360 U.S. at 577-578. And a dissenting opinion was based on disagreement that the act was within the scope of authority. 360 U.S. at 592.

Accordingly, *Barr* v. *Matteo* confirms the proposition that "executive officers are not liable in suits for damages for erroneous or even malicious conduct in office, *so long as they are acting within the scope of the authority given them.*" Mr. Justice Frankfurter concurring in *Joint Anti-Fascist Ref. Com.* v. *McGrath*, 341 U.S. 123, 157, n. 8 (emphasis supplied). Since immunity does not exist for acts in excess of authority, the "question here is, as it is in all cases where this doctrine of immunity is advanced, were these officials acting within the scope of their authority in the performance of the duties of their respective offices?" *Gibson* v. *Reynolds*, 172 F. 2d 95, 99 (C.A. 8), cert. denied, 337 U.S. 925. We have shown that respondents' actions in this case were unauthorized or unconstitutional. For that reason respondents are amenable to injunctive relief." And the action which is unauthorized or unconstitutional so as to subject the act to specific restraint does not become authorized or constitutional when the question at issue is recovery of damages. There is no double standard of authorized conduct.

Respondents suggest a double standard by their assertion that "Their action, whether or not authorized,

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[6] *Philadelphia Co.* v. *Stimson*, 223 U.S. 605, 620; *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 689-691.

was clearly taken in the performance of their official duties" (Res. br. p. 15, n. 7). But it is no part of the performance of official duty to act in excess of authority. "There could be no exercise of judgment and discretion in performing . . . an act that he had no right to do. When a public officer goes outside the scope of his authority or duty, he is not entitled to protection because of his office, but is liable for his acts like any private individual."[7] There is no manageable way to gradate the levels of exceeded authority. There is no good reason to attempt it.

What respondents get down to saying is that if action is taken in an official capacity this alone is enough to invoke absolute immunity on behalf of the actor. This Court stopped well short of that abyss in *Barr* v. *Matteo*, 360 U.S. 564. It goes sufficiently far to hold that within the scope of his authority an officer may act without fear of civil liability regardless of his motives. It goes too far to say that he need not fear even disregard of the limitations upon his authority so long as he acts under color of office.

Dicey long ago gave the fundamental answer to respondents' claim (Dicey, *Law of the Constitution*, 193-194 (10th ed. 1959)):

> With us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen. The Reports abound with cases in which officials have been brought before the courts, and made, in their personal capacity, liable to punishment, or to the payment of damages, for acts done in their official character but in excess of their lawful authority.

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[7] *Town of Randolph* v. *Ketchum*, 117 Vt. 468, 94 A. 2d 410, 414.

> A colonial governor, a secretary of state, a military officer, and all subordinates, though carrying out the commands of their official superiors, are as responsible for any act which the law does not authorize as is any private and unofficial person.

"Doubtless this statement of Dicey's . . . was an idealization of actuality. But in the perspective of our time its validity as an ideal has gained and not lost."[8] Recently the Canadian Supreme Court strikingly confirmed the principle, holding the Premier of Quebec liable in the amount of $33,123.53 for action beyond the scope of his authority in ordering the manager of the provincial liquor commission to cancel the liquor license of the plaintiff, an active member of Jehovah's Witnesses.[9] The law is not served by solicitude for officers who act in excess of their authority to the hurt of the citizenry. Compensation of the injured victim is not much of a step towards realization of the ideal of a rule of law.

There remains only to consider whether a distinction should be drawn between the department heads and their subordinates. The liability of the superintendent and the security officer of the Naval Gun Factory is clear. They did the act. Their act is so far unsanctioned that it is devoid even of internal departmental authorization. And "An agent who does an act otherwise a tort is not relieved from liability by the fact that he acted at the command of the principal or on account of the principal. . . ."[10] The liability of the

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[8] Mr. Justice Frankfurter dissenting in *Great Northern Life Ins. Co.* v. *Read*, 322 U.S. 47, 59, n. 2.

[9] *Roncarelli* v. *Duplessis*, [1959] 16 D. L. R. 2d 689.

[10] Restatement, Agency 2d, Sec. 343.

department heads is equally clear. They directed or adopted the act. Their insistence throughout the proceeding that the act was authorized fixes responsibility upon them on the basis of their own individual sanction of the act. And at least from the time of the institution of the lawsuit they knew or should have known of the particular act itself the lawfulness of which was challenged. They had the power to cause its cessation but chose instead to allow its continuance. The responsibility of the department heads is therefore not solely or predominantly vicarious but rests on their "personal fault."[11]

Rachel Brawner suffered a definite loss of earnings as a result of respondents' wrong. She recovers from respondents or she does not recover. It is unjust that the victim of the tort should bear her own loss.

II. SOME OBSERVATIONS ON RESPONDENTS' ARGUMENT

A. Another Supposed Way to Distinguish Greene v. McElroy

Respondents assert that, unlike *Greene* v. *McElroy*, in which clearance was "denied only on the basis of a fact determination reached through elaborate hearing and appeal procedures," in this case the procedure was altogether summary (Res. br. pp. 23-24). The assumption underlying the distinction is that the serious constitutional question posed in *Greene* because of want of confrontation and cross-examination arose only because a hearing of sorts had been granted. On this premise, provision for a partial hearing presents a grave question whether a full hearing is constitutionally compelled, but if *no* process is accorded then *due* process cannot be said to be denied.

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[11] Restatement, Agency 2d, Vol. 1, p. 454. See also, Harper and James, *The Law Of Torts*, Vol. 2, pp. 1362-63 (1956).

Common sense rebels. Murder is not less objectionable than manslaughter. And what common sense repels authority has rejected. In *Joint Anti-Fascist Refugee Com.* v. *McGrath*, 341 U.S. 123, the Attorney General designated organizations as subversive without notice or hearing of any kind. Summary listing constituted a denial of procedural due process. And the Attorney General did not "obtain immunity on the ground that designation is not an 'adjudication' or a 'regulation' in the conventional use of those terms. Due process is not confined in its scope to the particular forms in which rights have heretofore been found to have been curtailed for want of procedural fairness." Mr. Justice Frankfurter, *id.* at 173-174.

B. Respondents' Appeal to History

Respondents assert that internal departmental usage corroborates their authority to act. "This authorization is confirmed by the actual practice of military commanders throughout our history; they have regularly exercised authority to admit or exclude civilians selectively, as they deemed appropriate at the time" (Res. br. p. 38).[12]

The most that respondents show is that military personnel have told each other so often that they can do as they please concerning civilian presence on military land that they have come to believe it must be so. And these self-serving statements do not even relate to the present problem. For action taken on the basis of an adverse security determination is a relatively recent

[12] Reference to the terms upon which the Army and Navy may lease or license the use of military land is irrelevant (Res. br. pp. 45-51). Petitioners do not wish to lease land from the Gun Factory, erect telegraph posts on it, or construct bethels.

invention.[13] None of the instances cited by respondents pertain to it. The departmental regulations which do cover the subject do not confer but negative the authority asserted (Pet. br. pp. 31-58).

Furthermore, respondents' own showing does not support the unrestricted power they assert even as to the unrelated subjects to which the showing pertains.[14] Discriminatory exclusion "would be considered an abuse of discretion and the party proscribed would have good grounds for complaint" (Res. br. p. 42). In cases of ejection or refusal to admit, "the act constitutes an exercise of legal discretion, and it should be based on substantial conditions of fact" (Res. br. p. 43). The exercise of discretion to admit or exclude is "subject to the limitation that it may not be exercised arbitrarily" (Res. br. p. 52). And so, taken at face value, the only authority which usage confirms is a "legal discretion," to "be based on substantial conditions of fact," which "may not be exercised arbitrarily." Related to this case, respondents' actions were the epitome of arbitrariness, for in the absence of a reasonable procedure there is no meaningful assurance against arbitrariness.

Respondents' own showing confirms the necessity for a hearing if arbitrariness is to be truly guarded

[13] "Twenty years ago there was no personnel security system in this country." Report of the Special Committee on the Federal Loyalty-Security Program, Association of the Bar of the City of New York, ix (1956). Episodes preceding 1947 did not approach "the experience of the last decade in intensity, in sweep, or in the degree of public concern to which they gave rise." Brown, *Loyalty and Security*, 3 (1958).

[14] It also bears remembering that a hurried and uncritical collection of instances in a brief may be very far from an accurate portrayal of history.

against. Before the solicitation privilege of a life insurance agent within a military post is withdrawn or suspended he must "be afforded an opportunity to be heard" (Res. br. p. 53, n. 32). An automobile insurance salesman is similarly given "opportunity to be heard" (*ibid.*). "In addition, prior to final action the [insurance] company should be afforded an opportunity to explain the instances of misconduct by its agents upon which the proposed banning of all representatives is based." JAGA 1955 4105, May 2, 1955; JAGA 1955 4910, May 19, 1955. If insurance salesmen are given "an opportunity to be heard" and insurance companies "an opportunity to explain," there is not the least basis in reason for asserting that departmental usage authorizes a person to be deprived of employment and stigmatized as a security risk without any hearing or chance to explain.

But even if respondents' showing were all that is claimed for it, it would be essentially irrelevant. The showing is confined to military installations. The problem is broader than that. Civilian employees work for their civilian employers on land owned or controlled by the Atomic Energy Commission. Security is as important in such places as on military installations. There is no "history" to which the Atomic Energy Commission can appeal. And on the question of civilian presence on governmental land there is no basis for differentiating the Atomic Energy Commission from a military commander.

Finally, the ultimate relevant source of authority short of the Constitution is the President or Congress. Department practice is germane only as executive or congressional authorization is inferrable from knowledge of and acquiescense in it. But a far more impres-

sive showing of inferred authorization was rejected in *Greene* v. *McElroy*, 360 U.S. 474, 499-508. And the Constitution still stands in the way. A right to violate the Constitution is not acquired by prescription. This Court set aside nearly a century of judicial practice when its incompatibility with the Constitution became evident. *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64, 77-78. Nor did executive practice validate unconstitutional action by the President. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 588-589. The soliloquies of Judge Advocates General, even if they mean what respondents say, are small sounds in comparison.

C. Due Process

Respondents do not contest denial of due process but contend that Rachel Brawner had no "liberty" or "property" protected by it (Res. br. p. 57). Respondents attempt to refight a battle and regain ground that they have long since lost.

1. Respondents contend that, defamation aside, the interests asserted by petitioners have no analogue in private tort law, and that the Constitution does not subject government "to greater duties because it is the government . . ." (Res. br. p. 61-62). Respondents are wrong on both counts.

At least since *Lumley* v. *Gye*, 2 Ell. & Bl. 216, unjustified interference with an advantageous relationship has been a tort.[15] In the absence of valid authority to act, respondents' status is simply that of tortfeasors inducing the breach of a contract (the collective bargaining agreement) and the termination of an advan-

[15] The history is traced in Restatement, Torts, Vol. IV, pp. 49-53.

tageous relationship (the employment of Rachel Brawner safeguarded by the collective bargaining agreement). This Court was explicit as to this in *Greene* v. *McElroy*, 360 U.S. 474, 493, n. 22, stating that: "Respondents' actions, directed at petitioner as an individual, caused substantial injuries, . . . and, were they the subject of a suit between private persons, they could be attacked as an invasion of a legally protected right to be free from arbitrary interference with private contractual relationships. Moreover, petitioner has the right to be free from unauthorized actions of government officials which substantially impair his property interests." Nor can *Joint Anti-Fascist Refugee Com.* v. *McGrath*, 341 U.S. 123, be relegated, as respondents would (Res. br. p. 72), simply to vindication of a common law right to be free of defamation. Justiciability in the latter case did "not depend solely on the fact that the action challenged is defamatory." Mr. Justice Frankfurter, *id.* at 160. It rested also on interference with the "membership relation. . . ." *Id.* at 159.

Nor is it true that the Constitution protects only against invasions which would constitute wrongs between private persons. Standing "may be based on an interest created by the Constitution or a statute." *Id.* at 152. When the Fifth Amendment safeguards against deprivation "of life, liberty, or property, without due process of law," the protection it extends is not confined within the rubric of private law. The Constitution is its own measure of the security it vouchsafes. New wrongs innovated by governmental officers will not escape constitutional condemnation because they do not resemble a private tort.

2. Although respondents state that they "do not think these issues can be fruitfully discussed in terms of petitioners' 'standing,'" (Res. br. p. 59), they nevertheless rely heavily on *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, a case based exclusively on standing (Res. br. pp. 64-67). They assert that Rachel Brawner and the would-be sellers to the Government in *Lukens* are on a par.

In *Lukens*, Congress by statute provided that, in selling goods to the Government, the seller must pay its employees the minimum wage prevailing in the locality in which the seller operates as determined by the Secretary of Labor. *After notice and hearing* (310 U.S. at 117-120), the Secretary's designee determined the "locality" in which certain steel companies operated and established the minimum wage. The steel companies challenged the determination of the "locality," claiming that it was erroneous. They said that if they were required to pay the minimum wages in that locality, they could not successfully bid on government contracts, and they would therefore suffer a loss of income. In this context this Court held that the would-be sellers had no standing to complain.[16]

Every operative fact in this case is different from *Lukens*. In *Lukens*, "The contested action of the restrained officials did not invade private rights in a manner amounting to a tortious violation" (310 U.S. at 129). In this case it did. In *Lukens*, "it was not asserted that the authority under which the Government acted was invalid; only the correctness of an interpretation of a statute in the course of the exercise

[16] After the decision in *Lukens* Congress amended the statute to provide for judicial review at the instance of an "interested person." *George* v. *Mitchell*, 282 F. 2d 486 (C.A.D.C.).

of an admitted power was challenged." Mr. Justice Frankfurter in *Joint Anti-Fascist Refugee Com.* v. *McGrath*, 341 U.S. 123, 160; and see *id.* at 152-153. In this case the existence of authority and its validity if it exists are challenged. In *Lukens* there could be no claim of denial of procedural due process, for notice and hearing had been granted. And there could be no claim of denial of substantive due process, because the "locality" fixed was well within the regulatory power of Congress itself to establish or to delegate to administrative determination. In this case procedural due process was denied, and whether substantive due process was also denied can only be ascertained after the veil of secrecy is lifted by granting procedural due process.

Lukens and this case would be similar only if in *Lukens* the would-be seller in contracting with the Government had been required, as a condition of selling to the Government, to dismiss any employees who "fail to meet the security requirements . . . as determined by the Security Officer of the Activity" (R. 6). But it was *Greene* v. *McElroy*, not *Lukens*, which decided that case. And, contrary to respondents' undocumented assertion (Res. br. p. 67), we know of no constitutional doctrine which allows officers acting in a proprietary capacity in the exercise of a governmental function to abridge rights which they are required to respect when acting in a regulatory capacity. *Greene* v. *McElroy* itself negatives any such bifurcation. Valid authority to act is required whether it is a regulatory or proprietary function which is exercised.[17]

[17] Indeed, the distinction between the two was evolved to create greater liability on governmental units when acting in a proprietary capacity. *Trenton* v. *New Jersey*, 262 U.S. 182, 191-192.

3. After arguing at length that Rachel Brawner has no "liberty" or "property" which due process protects,[18] respondents are required to acknowledge, in deference to this Court's decisions in *Wieman* v. *Updegraff*, 344 U.S. 183, and *Slochower* v. *Board of Higher Ed.*, 350 U.S. 551, that there is at least enough "liberty" and "property" to invoke the protection of substantive due process but, they say, not procedural due process (Res. br. pp. 67-71). It is hard to understand why "liberty" or "property" for the purpose of substantive due process is not "liberty" or "property" for the purpose of procedural due process. Respondents tell us that, while it is not a distinction which this Court has made "explicit" (Res. br. p. 70), *Wieman* and *Slochower* are truly to be explained as denials of equal protection, not due process (Res. br. pp. 69-70). But this Court said in *Wieman* that the test "oath offends due process" (344 U.S. at 191), and it said in *Slochower* that a discharge for invoking the privilege against self-incrimination "violates due process of law" (350 U.S. at 559). And since these cases are based on the Fourteenth Amendment, which includes an explicit equal protection clause as well as a due process clause, it was singularly obtuse of this Cou. to invoke the wrong clause. Furthermore, respondents agree that the power denied by *Wieman* and *Slochower* to th States under the Fourteenth Amendment is also denied to the federal government under the Fifth Amendment. But since the Fifth Amendment does not

[18] Respondents contend that, as Rachel Brawner could lose her job by the closing of the Gun Factory or the cessation of cafeteria operations on the premises, she loses nothing if she is deprived of her job before either event (Res. br. pp. 78-79). We had not understood that the liability of a person to a natural death excuses his murder.

contain an equal protection clause, the prohibition must operate via the due process clause, and this requires a deprivation of "liberty" or "property." That the deprivation is grounded in discriminatory action, rather than arbitrary action, does not alter the fact that it is "liberty" or "property" which is being taken. *Bolling* v. *Sharpe*, 347 U.S. 497, 499-500. And if it is "liberty" or "property" for the purpose of substantive due process, it cannot be something less for the purpose of procedural due process. Finally, respondents' withings ignore *Greene* v. *McElroy*, a case of procedural due process. On respondents' hypothesis, this Court was mistaken in that case in believing that there was a serious constitutional question presented which should be avoided, for William Greene had no "liberty" or "property" capable of deprivation by a denial of procedural due process.

A fundamental insensitivity underlies respondents' slighting of procedural due process by the dichotomy they draw between it and substantive due process. If there is any primacy between the two, it belongs to procedural due process. Forty years ago, Mr. Justice Brandeis observed that "in the development of our liberty insistence upon procedural regularity has been a large factor." *Burdeau* v. *McDowell*, 256 U.S. 465, 477. Mr. Justice Frankfurter wrote for this Court that "The history of liberty has largely been the history of observance of procedural safeguards." *McNabb* v. *United States*, 318 U.S. 332, 347. Concurring in *Joint Anti-Fascist Refugee Com.* v. *McGrath*, 341 U.S. 123, 179, Mr. Justice Douglas stated that "It is not without significance that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law

and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law." And see Mr. Justice Frankfurter, *id.* at 164: "Procedural fairness and regularity," said Mr. Justice Jackson, "are of the indispensable essence of liberty." Dissenting in *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 224.

Respondents see little use in procedural due process because in their view not much can in any event be done to safeguard employees from substantive arbitrariness. According to them, "final responsibility . . . must lie in the executive; . . . the executive may ultimately act in this area on doubts or simply a lack of complete confidence; and . . . the ultimate determination and judgment of the executive are not judicially reviewable" (Res. br. p. 80). They reiterate that action may "be based on no more than doubt . . ." (*ibid.*); and they say again that "the government's action need imply no more than a *doubt* of her reliability—a doubt consistent with the likelihood . . . that she is *in fact* loyal" (*id.* at 86, emphasis in original).

We had thought that "the nature and the theory of our institutions of government . . . do not mean to leave room for the play and action of purely personal and arbitrary power." *Yick Wo* v. *Hopkins,* 118 U.S. 356, 366. If the reliability of a person were doubted because he is a "Republican, Jew, or Negro," that doubt could not stand. Judicial correction of action based on that doubt could not be resisted by invoking immunity to judicial review. And a standard of action based "on no more than doubt" itself presents a grave question of constitutional validity. For by such a standard "the Anglo-Saxon presumption of

innocence is shifted and for all practical purposes the burden is placed on the individual to prove beyond a reasonable doubt his loyalty and integrity. When it is remembered that the employees or applicants are being judged not on their actions but on their supposed ideas or mental attitudes and that the charges against them may be based on secret evidence, the extreme nature of this final action is apparent. It may indeed be asked whether the dangers which confront us are really of such a character as to justify such radical departures from what have traditionally been thought to be constitutional standards of fair play." O'Brien, *New Encroachments On Individual Freedom*, 66 Harv. L. Rev. 1, 19 (1952).[19]

But whatever the content of substantive protection, it can never be realized until procedural due process is first extended. We must know what is being done before we can know whether something should be done about it. The spy that the security officer thinks he has spotted may turn out on a hearing to be a case of mistaken identity. "Liberty is established and preserved by the development and maintenance of proper procedures. It is, in the last analysis, only through procedural rules that the individual is protected against arbitrary governmental action. And, . . . the very essence of liberty is the protection of the individual against arbitrary application of the collective power of the state." Griswold, *The Fifth Amendment Today*, 39 (1955).

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[19] Respondents rely on and quote from *Von Knorr v. Miles*, 60 F. Supp. 962, 971 (D. Mass.) (Res. br. p. 81). So did the court below in *Greene* v. *McElroy* (254 F. 2d at 951-952 and n. 21), but this Court in its opinion did not mention the case. The dead ought to be allowed to stay buried.

4. Respondents inveigh against judicial intrusion into the "internal affairs" of government and "the discretion of the executive" (Res. br. p. 72). The action challenged here is unauthorized or unconstitutional conduct. If it be so, the "actions would not constitute exercises of . . . administrative discretion, and . . . judicial relief from this illegalty would be available." *Harmon* v. *Brucker*, 355 U.S. 579, 582. The historic function of the judiciary is to curb just such executive excess. "The objection to judicial restraint of an unauthorized exercise of powers is not weighty." Mr. Justice Frankfurter concurring in *Joint Anti-Fascist Refugee Com.* v. *McGrath*, 341 U.S. 123, 157.

D. First Amendment

According to respondents, an adverse security determination may be made "on the basis of speech or action which may be within the general area of the First Amendment, but which raises a suspicion that the person is or could easily become a security risk, or even merely produces a lack of confidence in the person" (Res. br. p. 59, n. 35). Thus "suspicion" or "lack of confidence" drawn from the valid exercise of First Amendment rights is confessedly a basis for adverse action. The collision with the First Amendment could hardly be more forthright. This is the law of seditious libel clothed in contemporary garb.

More than that. The adverse determination based on the exercise of First Amendment rights is altogether *ex parte* and summary. There is no opportunity even to show that what was thought to be said was in fact not said, or that what was said does not reasonably permit an inference of "suspicion" or "lack of con-

fidence." And on respondents' view there is no question of "separation of legitimate from illegitimate speech. . . ." *Speiser* v. *Randall*, 357 U.S. 513, 525. For legitimate speech itself is claimed to be a valid basis for adverse action. On respondents' premise it is therefore beside the point that the "vice of the present procedure is that, where particular speech falls close to the line separating the lawful and the unlawful the possibility of mistaken factfinding—inherent in all litigation—will create the danger that the legitimate utterance will be penalized." *Id.* at 526. Any speech is fair game that a security officer thinks is suspicious. Thus we have the double vice of predicating adverse action on the valid exercise of First Amendment rights plus the taking of such action on what may be "incompetent information or no information at all." *Id.* at 528. If this does not offend the First Amendment, then it fails to keep pace with contemporary methods of suppression.

Respectfully submitted,

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January 1961

SUPREME COURT OF THE UNITED STATES

No. 97.—October Term, 960.

Cafeteria and Restaurant Workers Union, Local 473, AFL–CIO, et al., Petitioners, *v.* Neil H. McElroy, et al.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[June 19, 1961.]

Mr. Justice Stewart delivered the opinion of the Court.

In 1956 the petitioner Rachel Brawner was a short-order cook at a cafeteria operated by her employer, M & M Restaurants, Inc., on the premises of the Naval Gun Factory[1] in the city of Washington. She had worked there for more than six years, and from her employer's point of view her record was entirely satisfactory.

The Gun Factory was engaged in designing, producing, and inspecting naval ordnance, including the development of weapons systems of a highly classified nature. Located on property owned by the United States, the installation was under the command of Rear Admiral D. M. Tyree, Superintendent. Access to it was restricted, and guards were posted at all points of entry. Identification badges were issued to persons authorized to enter the premises by the Security Officer, a naval officer subordinate to the Superintendent. In 1956 the Security Officer was Lieutenant Commander H. C. Williams. Rachel Brawner had been issued such a badge.

[1] The name of the Naval Gun Factory has now been officially changed to Naval Weapons Plant. It will be referred to as the "Gun Factory" in this opinion.

The cafeteria where she worked was operated by M & M under a contract with the Board of Governors of the Gun Factory. Section 5 (b) of the contract provided:

> ". . . In no event shall the Concessionaire engage, or continue to engage, for operations under this Agreement, personnel who
>
> . . . . . .
>
> "(iii) fail to meet the security requirements or other requirements under applicable regulations of the Activity, as determined by the Security Officer of the Activity."

On November 15, 1956, Mrs. Brawner was required to turn in her identification badge because of Lieutenant Commander Williams's determination that she had failed to meet the security requirements of the installation. The Security Officer's determination was subsequently approved by Admiral Tyree, who cited § 5 (b)(iii) of the contract as the basis for his action. At the request of the petitioner Union, which represented the employees at the cafeteria, M & M sought to arrange a meeting with officials of the Gun Factory "for the purpose of a hearing regarding the denial of admittance to the Naval Gun Factory of Rachel Brawner." This request was denied by Admiral Tyree on the ground that such a meeting would "serve no useful purpose."

Since the day her identification badge was withdrawn Mrs. Brawner has not been permitted to enter the Gun Factory. M & M offered to employ her in another restaurant which the company operated in the suburban Washington area, but she refused on the ground that the location was inconvenient.

The petitioners brought this action in the District Court against the Secretary of Defense, Admiral Tyree, and Lieutenant Commander Williams, in their individual and official capacities, seeking, among other things, to

compel the return to Mrs. Brawner of her identification badge, so that she might be permitted to enter the Gun Factory and resume her former employment. The defendants filed a motion for summary judgment, supported by various affidavits and exhibits. The motion was granted and the complaint dismissed by the District Court. This judgment was affirmed by the Court of Appeals for the District of Columbia, sitting *en banc*. Four judges dissented.[2] We granted certiorari because of an alleged conflict between the Court of Appeals's decision and *Greene* v. *McElroy*, 360 U. S. 474. 364 U. S. 813.

As the case comes here, two basic questions are presented. Was the commanding officer of the Gun Factory authorized to deny Rachel Brawner access to the installation in the way he did? If he was so authorized, did his action in excluding her operate to deprive her of any right secured to her by the Constitution?

I.

In *Greene* v. *McElroy*, *supra*, the Court was unwilling to find, in the absence of explicit authorization, that an aeronautical engineer, employed by a private contractor on private property, could be barred from following his profession by governmental revocation of his security clearance without according him the right to confront and cross-examine hostile witnesses. The Court in that case found that neither the Congress nor the President had explicitly authorized the procedure which had been followed in denying Greene access to classified information. Accordingly we did not reach the constitutional issues

[2] The appeal was originally heard by a panel of three judges, and the District Court's judgment was reversed, one judge dissenting. After rehearing *en banc*, the original opinion was withdrawn, and the District Court's judgment was affirmed. 284 F. 2d 173.

which that case otherwise would have presented. We proceed on the premise that the explicit authorization found wanting in *Greene* must be shown in the present case, putting to one side the Government's argument that the differing circumstances here justify less rigorous standards for measuring delegation of authority.

It cannot be doubted that both the legislative and executive branches are wholly legitimate potential sources of such explicit authority. The control of access to a military base is clearly within the constitutional powers granted to both Congress and the President. Article I, § 8, of the Constitution gives Congress the power to "provide and maintain a Navy;" to "make Rules for the Government and Regulation of the land and naval Forces;" to "exercise exclusive Legislation . . . over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazine, Arsenals, dock-Yards, and other needful Buildings;" and to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . . ." Broad power in this same area is also vested in the President by Article II, § 2, which makes him the Commander in Chief of the Armed Forces.

Congress has provided that the Secretary of the Navy "shall administer the Department of the Navy" and shall have "custody and charge of all . . . property of the Department." 10 U. S. C. § 5031 (a)(c). In administering his Department, the Secretary has been given statutory power to "prescribe regulations, not inconsistent with law, for the government of his department, . . . and the custody, use, and preservation of the . . . property appertaining to it." 5 U. S. C. § 22. The law explicitly requires that United States Navy Regulations shall be approved by the President, 10 U. S. C. § 6011, and the

pertinent regulations in effect when Rachel Brawner's identification badge was revoked had, in fact, been expressly approved by President Truman on August 9, 1948.

The requirement of presidential approval of Navy regulations is of ancient vintage.[3] The significance of such presidential approval has often been recognized by this Court. *Smith* v. *Whitney*, 116 U. S. 167, 181; *Johnson* v. *Sayre*, 158 U. S. 109, 117; *United States Grain Corp.* v. *Phillips*, 261 U. S. 106, 109; *Denby* v. *Berry*, 263 U. S. 29, 37.[4] We may take it as settled that Navy Regulations approved by the President are, in the words of Chief Justice Marshall, endowed with "the sanction of the law." *United States* v. *Maurice*, 2 Brock. 96, 105.[5] And we find no room for substantial doubt that the Navy Regulations in effect on November 15, 1956, explicitly conferred upon Admiral Tyree the power summarily to deny Rachel Brawner access to the Gun Factory.

Article 0701 of the Regulations delineates the traditional responsibilities and duties of a commanding officer. It provides in part as follows:

> "The responsibility of the commanding officer for his command is absolute, except when, and to the extent, relieved therefrom by competent authority, or as provided otherwise in these regulations. The

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[3] See R. S. § 1547 (1875) which was derived from the Act of July 14, 1862, c. 164, § 5, 12 Stat. 565. See also the Act of April 24, 1816, c. 69, § 9, 3 Stat. 298; the Act of March 3, 1813, c. 52, § 5, 2 Stat. 819.

[4] See also 25 Op. Atty. Gen. 270.

[5] The absence of presidential approval was relied upon in one case as a basis for finding certain administrative action unauthorized. See *Phillips* v. *United States Grain Corp.*, 279 F. 244, 248–249, rev'd on other grounds, 261 U. S. 106. See also 25 Op. Atty. Gen. 270, 275.

authority of the commanding officer is commensurate with his responsibility, subject to the limitations prescribed by law and these regulations. . . ."

Article 0734 of the Regulations provides:

"In general, dealers or tradesmen or their agents shall not be admitted within a command, except as authorized by the commanding officer:

"1. To conduct public business.

"2. To transact specific private business with individuals at the request of the latter.

"3. To furnish services and supplies which are necessary and are not otherwise, or are insufficiently, available to the personnel of the command."

It would be difficult to conceive of a more specific conferral of power upon a commanding officer, in the exercise of his traditional command responsibility, to exclude from the area of his command a person in Rachel Brawner's status. Even without the benefit of the illuminating gloss of history, it could hardly be doubted that the phrase "tradesmen or their agents" covered her status as an employee of M & M with explicit precision.[6] But the meaning of the regulation need not be determined *in vacuo*. It is the verbalization of the unquestioned authority which commanding officers of military installations have exercised throughout our history.[7]

An opinion by Attorney General Butler in 1837 discloses that the power of a military commanding officer to

[6] A tradesman has been defined by Webster as "a shopkeeper: also, one of his employees." Webster, New International Dictionary (Second Edition, Unabridged, 1958), 2684.

[7] The contrast with the history of the security program involved in *Greene* v. *McElroy* is striking. There it was pointed out that "[p]rior to World War II, only sporadic efforts were made to control the clearance of persons who worked in private establishments which manufactured materials for national defense." 360 U. S., at 493.

exclude at will persons who earned their living by working on military bases was even then of long standing. Speaking of the Superintendent of the Military Academy, the Attorney General's opinion stated:

> "[H]e has always regarded the citizens resident within the public limits—such as the sutler, keeper of the commons, tailor, shoemaker, artificers, etc., even though they own houses on the public grounds, or occupy buildings belonging to the United States . . . —as *tenants at will*, and liable to be removed whenever, in the opinion of the superintendent, the interests of the academy require it. 'This,' he observes, 'has been the practice since I have been in command; and such, I am told, was the usage under the administration of my predecessors.'" 3 Op. Atty. Gen. 268, 269.

This power has been expressly recognized many times. "The power of a military commandant over a reservation is necessarily extensive and practically exclusive, forbidding entrance and controlling residence as the public interest may demand." 26 Op. Atty. Gen. 91, 92. "[I]t is well settled that a post commander can, in his discretion, exclude all persons other than those belonging to his post from post and reservation grounds." JAGA 1904/16272, 6 May 1904. "It is well settled that a Post Commander can, under the authority conferred on him by statutes and regulations, in his discretion, exclude private persons and property therefrom, or admit them under such restrictions as he may prescribe in the interest of good order and military discipline (1918 Dig. Op. J. A. G. 267 and cases cited)." JAGA 1925/680.44, 6 October 1925.

Under the explicit authority of Article 0734 of the Navy Regulations, and in the light of the historically unques-

tioned power of a commanding officer summarily to exclude civilians from the area of his command, there can remain no serious doubt of Admiral Tyree's authority to exclude Rachel Brawner from the Gun Factory upon the Security Officer's determination that she failed to meet the "security requirements . . . . of the Activity." Her admittance to the installation in the first place was permissible, in the commanding officer's discretion, only because she came within the exception to the general rule of exclusion contained in the third paragraph of Article 0734 of the Regulations. And the plain words of Article 0734 made absolute the commanding officer's power to withdraw her permission to enter the Gun Factory at any time.

II.

The question remains whether Admiral Tyree's action in summarily denying Rachel Brawner access to the site of her former employment violated the requirements of the Due Process Clause of the Fifth Amendment. This question cannot be answered by easy assertion that, because she had no constitutional right to be there in the first place, she was not deprived of liberty or property by the Superintendent's action. "One may not have a constitutional right to go to Baghdad, but the Government may not prohibit one from going there unless by means consonant with due process of law." *Homer* v. *Richmond*, — F. 2d — (C. A. D. C. Cir., April 20, 1961). It is the petitioner's claim that due process in this case required that Rachel Brawner be advised of the specific grounds for her exclusion and be accorded a hearing at which she might refute them. We are satisfied, however, that under the circumstances of this case such a procedure was not constitutionally required.

The Fifth Amendment does not require a trial-type hearing in every conceivable case of government impair-

ment of private interest. "For, though 'due process of law' generally implies and includes *actor, reus, judex*, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings, . . . yet, this is not universally true." *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 18 How. 272, 280. The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation. *Communications Comm'n* v. *WJR*, 337 U. S. 265, 275–276; *Hannah* v. *Larche*, 363 U. S. 420, 440, 442; *Hagar* v. *Reclamation District No. 108*, 111 U. S. 701, 708–709. "'[D]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." It is "compounded of history, reason, the past course of decisions . . . ." *Joint Anti-Fascist Comm.* v. *McGrath*, 341 U. S. 123, 162–163 (concurring opinion).

As these and other cases make clear, consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action. Where it has been possible to characterize that private interest (perhaps in over-simplification) [8] as a mere privilege subject to the Executive's plenary power, it has traditionally been held that notice and hearing are not constitutionally required. *Oceanic Navigation Co.* v. *Stranahan*, 214 U. S. 320, 340–343; *Knauff* v. *Shaughnessy*, 338 U. S. 537; *Jay* v. *Boyd*, 351 U. S. 345, 354–358; cf. *Buttfield* v. *Stranahan*, 192 U. S. 470, 497.

What, then, was the private interest affected by Admiral Tyree's action in the present case? It most assuredly was not the right to follow a chosen trade or

[8] See Davis, The Requirement of a Trial-Type Hearing, 70 Harv. L. Rev. 193, 222–224.

profession. Cf. *Dent* v. *West Virginia*, 129 U. S. 114; *Schware* v. *Board of Bar Examiners*, 353 U. S. 232; *Truax* v. *Raich*, 239 U. S. 33. Rachel Brawner remained entirely free to obtain employment as a short-order cook or to get any other job, either with M & M or with any other employer. All that was denied her was the opportunity to work at one isolated and specific military installation.

Moreover, the governmental function operating here was not the power to regulate or license, as lawmaker, an entire trade or profession, or to control an entire branch of private business, but, rather, as proprietor, to manage the internal operation of an important federal military establishment. See *People* v. *Crane*, 214 N. Y. 154, 167–169 (per Cardozo, J.); cf. *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 129. In that proprietary military capacity, the Federal Government, as has been pointed out, has traditionally exercised unfettered control.

Thus, the nature both of the private interest which has been impaired and the governmental power which has been exercised makes this case quite different from that of the lawyer in *Schware, supra*, the physician in *Dent, supra*, and the cook in *Raich, supra*. This case, like *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, involves the Federal Government's dispatch of its own internal affairs. The Court has consistently recognized that an interest closely analogous to Rachel Brawner's, the interest of a government employee in retaining his job, can be summarily denied. It has become a settled principle that government employment, in the absence of legislation, can be revoked at the will of the appointing officer. *In the Matter of Hennen*, 13 Pet. 230, 246, 259; *Crenshaw* v. *United States*, 134 U. S. 99, 108; *Parsons* v. *United States*, 167 U. S. 324, 331–334; *Keim* v. *United States*, 177 U. S. 290, 293–294; *Taylor and Marshall* v. *Beckham*, (*No. 1*), 178 U. S. 548, 575–578. This principle was

reaffirmed quite recently in *Vitarelli* v. *Seaton*, 359 U. S. 535. There we pointed out that Vitarelli, an Interior Department employee who had not qualified for statutory protection under the Civil Service Act, "could have been summarily discharged by the Secretary at any time without the giving of a reason . . . ." 359 U. S., at 539.

It is argued that this view of Rachel Brawner's interest is inconsistent with our decisions in *United Public Workers* v. *Mitchell*, 330 U. S. 75, and *Wieman* v. *Updegraff*, 344 U. S. 183. In those two cases an individual's interest in government employment was recognized as entitled to constitutional protection, and it is contended that what the Court said in deciding them would require us to hold that Rachel Brawner was entitled to notice and hearing in this case. In *United Public Workers* the Court observed that "[n]one would deny" that "Congress may not 'enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work.'" 330 U. S., at 100. In *Wieman* the Court held unconstitutional a statute which excluded persons from state employment solely on the basis of membership in alleged "Communist-front" or "subversive" organizations, regardless of their knowledge concerning the activities and purposes of the organizations to which they had belonged. In the course of its decision the Court said, "We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." 344 U. S., at 192.

Nothing that was said or decided in *United Public Workers* or *Wieman* would lead to the conclusion that Rachel Brawner could not be denied access to the Gun Factory without notice and an opportunity to be heard.

Those cases demonstrate only that the state and federal governments, even in the exercise of their internal operations, do not constitutionally have the complete freedom of action enjoyed by a private employer. But to acknowledge that there exist constitutional restraints upon state and federal governments in dealing with their employees is not to say that all such employees have a constitutional right to notice and a hearing before they can be removed. We may assume that Rachel Brawner could not constitutionally have been excluded from the Gun Factory if the announced grounds for her exclusion had been patently arbitrary or discriminatory—that she could not have been kept out because she was a Democrat or a Methodist. It does not follow, however, that she was entitled to notice and a hearing when the reason advanced for her exclusion was, as here, entirely rational and in accord with the contract with M & M.

Finally, it is to be noted that this is not a case where government action has operated to bestow a badge of disloyalty or infamy, with an attendant foreclosure from other employment opportunity. See *Wieman* v. *Updegraff*, 344 U. S. 183, 190–191; *Joint Anti-Facist Comm.* v. *McGrath*, 341 U. S. 123, 140–141; cf. *Bailey* v. *Richardson*, 86 U. S. App. D. C. 248, 182 F. 2d 46, aff'd by an equally divided Court, 341 U. S. 918.[9] All this record shows is that, in the opinion of the Security Officer of the Gun Factory, concurred in by the Superintendent, Rachel Brawner failed to meet the particular security requirements of that specific military installation. There is nothing to indicate that this determination would in any way impair Rachel Brawner's employment opportunities

[9] Compare Davis, The Requirement of a Trial-Type Hearing, 70 Harv. L. Rev. 193, 229–230, and Note, The Supreme Court, 1950 Term, 65 Harv. L. Rev. 107, 156–158, with Richardson, Problems in the Removal of Federal Civil Servants, 54 Mich. L. Rev. 219, 240–241.

anywhere else.[10] As pointed out by Judge Prettyman, speaking for the Court of Appeals, "Nobody has said that Brawner is disloyal or is suspected of the slightest shadow of intentional wrongdoing. 'Security requirements' at such an installation, like such requirements under many other circumstances, cover many matters other than loyalty." 284 F. 2d, at 183. For all that appears, the Security Officer and the Superintendent may have simply thought that Rachel Brawner was garrulous, or careless with her identification badge.

For these reasons, we conclude that the Due Process Clause of the Fifth Amendment was not violated in this case.

Affirmed.

[10] In oral argument government counsel emphatically represented that denial of access to the Gun Factory would not "by law or in fact" prevent Rachel Brawner from obtaining employment on any other federal property.

SUPREME COURT OF THE UNITED STATES

No. 97.—October Term, 1960.

Cafeteria and Restaurant Workers Union, Local 473, AFL–CIO, et al., Petitioners, *v.* Neil H. McElroy, et al.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[June 19, 1961.]

Mr. Justice Brennan, with whom The Chief Justice, Mr. Justice Black and Mr. Justice Douglas join, dissenting.

I have grave doubts whether the removal of petitioner's identification badge for "security reasons" without notice of charges or opportunity to refute them was authorized by statute or executive order. See *Greene* v. *McElroy*, 360 U. S. 474 (1959). But under compulsion of the Court's determination that there was authority, I pass to a consideration of the more important constitutional issue, whether petitioner has been deprived of liberty or property without due process of law in violation of the Fifth Amendment.

I read the Court's opinion to acknowledge that petitioner's status as an employee at the Gun Factory was an interest of sufficient definiteness to be protected by the Federal Constitution from some kinds of governmental injury. Indeed, this acknowledgment seems compelled by our cases. *Wieman* v. *Updegraff*, 344 U. S. 183, (1952); *United Public Workers* v. *Mitchell*, 330 U. S. 75, 100 (1947) (*dictum*); *Torcaso* v. *Watkins*, *post*, p. —, decided today. In other words, if petitioner Brawner's badge had been lifted avowedly on grounds of her race, religion, or political opinions, the Court would concede that some constitutionally protected interest—whether

"liberty" or "property" it is unnecessary to state—had been injured. But, as the Court says, there has been no such open discrimination here. The expressed ground of exclusion was the obscuring formulation that petitioner failed to meet the "security requirements" of the naval installation where she worked. I assume for present purposes that separation as a "security risk," if the charge is properly established, is not unconstitutional. But the Court goes beyond that. It holds that the mere assertion by government that exclusion is for a valid reason forecloses further inquiry. That is, unless the government official is foolish enough to admit what he is doing—and few will be so foolish after today's decision—he may employ "security requirements" as a blind behind which to dismiss at will for the most discriminatory of causes.

Such a result in effect nullifies the substantive right—not to be arbitrarily injured by Government—which the Court purports to recognize. What sort of right is it which enjoys absolutely no procedural protection? I do not mean to imply that petitioner could not have been excluded from the installation without the full procedural panoply of first having been subjected to a trial, with cross-examination and confrontation of accusers, and proof of guilt beyond a reasonable doubt. I need not go so far in this case. For under today's holding petitioner is entitled to no process at all. She is not told what she did wrong; she is not given a chance to defend herself. She may be the victim of the basest calumny, perhaps even the caprice of the government officials in whose power her status rested completely. In such a case, I cannot believe that she is not entitled to some procedures. "[T]he right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U. S. 123, 168 (1951)

(concurring opinion). See also *Homer* v. *Richmond*, — F. 2d — (C. A. D. C. Cir. 1961); *Parker* v. *Lester*, 227 F. 2d 708 (C. A. 9th Cir. 1955). In sum, the Court holds that petitioner has a right not to have her identification badge taken away for an "arbitrary" reason, but no right to be told in detail what the reason is, or to defend her own innocence, in order to show, perhaps, that the true reason for deprivation was one forbidden by the Constitution. That is an internal contradiction to which I cannot subscribe.

One further circumstance makes this particularly a case where procedural requirements of fairness are essential. Petitioner was not simply excluded from the base summarily, without a notice and chance to defend herself. She was excluded as a "security risk," that designation most odious in our times. The Court consoles itself with the speculation that she may have been merely garrulous, or careless with her identification badge, and indeed she might, although she will never find out. But in the common understanding of the public with whom petitioner must hereafter live and work the term "security risk" carries a much more sinister meaning. See *Beilan* v. *Board of Public Education*, 357 U. S. 399, 421–423 (1958) (dissenting opinion). It is far more likely to be taken as an accusation of communism or disloyalty than imputation of some small personal fault. Perhaps the Government has reasons for lumping such a multitude of sins under a misleading term. But it ought not to affix a "badge of infamy," *Wieman* v. *Updegraff*, *supra*, at 191, to a person without some statement of charges, and some opportunity to speak in reply.

It may be, of course, that petitioner was justly excluded from the Gun Factory. But in my view it is fundamentally unfair, and therefore violative of the Due Process Clause of the Fifth Amendment, to deprive her of a valuable relationship so summarily.